

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

QUALITY CARE AMBULANCE
SERVICE, INC., QUALITY CARE
TRANSPORTATION SERVICE,
INC. and QUALITY CARE
OF EAST TENNESSEE, INC.,

Debtors.

Nos. 00-22579 through 00-22581
Chapter 11
Jointly Administered

QUALITY CARE AMBULANCE
SERVICE, INC. and
QUALITY CARE OF EAST
TENNESSEE, INC.,

Plaintiffs,

vs.

Adv. Pro. No. 01-2052

BLUE CROSS/BLUE SHIELD OF
TENNESSEE, INC.; EAST TENNESSEE
COMMUNITY SERVICE AGENCY;
SHARRON FOX, individually and as
Transportation Director of East
Tennessee Community Service
Agency; NORTHEAST COMMUNITY
SERVICE AGENCY; WILMETTA
WILLIAMS, individually and as
Director of Northeast Community
Service Agency; and KENT
HAMPTON, individually and as
Transportation Director of
Northeast Community Service
Agency,

Defendants.

M E M O R A N D U M

APPEARANCES :

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Community Service Agency, Sharron Fox,
Northeast Community Service Agency,
Wilmetta Williams and Kent Hampton*

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the plaintiffs seek damages for "actual breach of contract, tortious interference with a contract and/or tortious interference with business relations." Presently pending before the court is the motion to dismiss of all defendants except Blue Cross/Blue Shield of Tennessee, Inc. ("BCBS") for failure to state a claim for breach of contract and lack of subject matter jurisdiction based on sovereign immunity pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b). In their response to

the motion to dismiss, the plaintiffs concede that this action should be dismissed as to the State of Tennessee defendants, i.e., East Tennessee Community Service Agency ("ETCSA") and Northeast Community Service Agency ("NECSA") along with the individually named defendants in their official capacities based on "constitutional immunity." The plaintiffs also concede that "the cause of action against said defendants should lie in tort and not breach of contract." The plaintiffs maintain, however, that the individual defendants are not protected by sovereign immunity in their individual capacities. For the reasons discussed below, the court agrees with plaintiffs as to defendants Sharron Fox and Kent Hampton, but disagrees regarding defendant Wilmetta Williams.* Accordingly, the motion to dismiss will be granted with respect to the breach of contract claim and as to the movants, with the exception of Ms. Fox and Mr. Hampton in their individual capacities. Notwithstanding the allegation of lack of subject matter jurisdiction, this court clearly has the authority in the first instance to determine whether it has jurisdiction. See *Victory Markets, Inc. v. New York Dep't of*

*The complaint lists Ms. Williams first name as Wilmetta, while the motion to dismiss and memorandum in support thereof refer to "Wihelmina" Williams, and an agreed order for an extension of time to respond states Ms. Williams' first name as "Wilhelmina." Although the court surmises that "Wilhelmina" is correct, the court will utilize the name set forth in the complaint absent a clarification from the parties.

Labor (In re Victory Markets, Inc.), 263 B.R. 9, 11 (Bankr. N.D.N.Y. 2000). This is a core proceeding. See 28 U.S.C. § 157(b)(2)(A) and (O).

I.

The plaintiffs, Quality Care Ambulance Service, Inc. and Quality Care of East Tennessee, Inc., are Tennessee corporations which provide ambulance transportation services in east Tennessee. According to the complaint in this case, in 1993 the state of Tennessee instituted the TennCare program in place of Medicaid whereby indigent health care was provided through contracts with various insurance companies, including BCBS. In order for BCBS to provide ambulance transportation services to its insured under the TennCare program, BCBS utilized Tennessee's community service agencies which selected ambulance providers based on the lowest bid. As set forth in the complaint, the community service agencies, including defendants ETCSA and NECSA, "were to intake calls from or regarding ... patients seeking transportation services, and the [community service agency] was to call out a participating ambulance company to provide the needed service." The plaintiffs allege that from 1994 to the present, ETCSA and NECSA failed to properly call plaintiffs even though they had the lowest bid.

The plaintiffs state the "failure to call the Plaintiffs constitutes breach of contract and/or tortious interference with contract and/or tortious interference with business relations" causing plaintiffs to suffer monetary damages.

In their motion to dismiss, the moving defendants cite the Eleventh Amendment to the United States Constitution and TENN. CODE ANN. § 9-8-307(h) as the basis for their assertion that sovereign immunity bars this action against them as agents of the state, regardless of the capacity in which liability is asserted. In response to the motion to dismiss, while as previously noted the plaintiffs concede immunity for the defendants in their official capacities, they assert there is no constitutional immunity for intentional, tortious acts by state employees outside the scope of their employment.

II.

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The United States Supreme Court has construed this Amendment as an "affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984). Absent its express consent, a state "is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Id.* at 100. This immunity extends not only to a state and its agencies, but also to state officials in their official capacities. *Will v. Michigan Dept. State Police*, 491 U.S. 58, 71 (1989). "However, neither the Eleventh Amendment nor *Pennhurst* deprives federal courts of jurisdiction over state law claims for damages against state officials sued in their individual capacities." *Williams v. Kentucky*, 24 F.3d 1526, 1543 (6th Cir. 1994). See also *Kearney v. Department of Indus. Relations*, 1996 WL 290265, *1 (6th Cir. May 31, 1996)("The Eleventh Amendment ... does ... [not] bar suit against state officials in their individual capacity."); *Wilson v. Wayne County*, 856 F. Supp. 1254, 1263 n.9 (M.D. Tenn. 1994)("The Eleventh Amendment forbids suits for money damages against state officials in the *official* capacities.... However, it does not bar such suits against state officials in their *individual* capacities.). Thus, the Eleventh Amendment does not provide a basis for dismissal of this action against the individually-named defendants in their individual capacity.

The movants' alternative basis for immunity is TENN. CODE ANN.

§ 9-8-307(h) which provides in relevant part that:

State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious, or criminal acts or omissions or for the acts or omissions done for personal gain.

"This immunity applies to state law claims filed in federal as well as state courts." *Purisch v. Tennessee Tech. Univ.*, 76 F.3d 1414, 1421 (6th Cir. 1996). The plaintiffs assert that they have alleged in the complaint that the individual defendants' actions were intentional and malicious, and, as such, fall outside of TENN. CODE ANN. § 9-8-307(h)'s protection. See *Walker v. Norris*, 917 F.2d 1449, 1459 (6th Cir. 1990)("According to section 9-8-307(h), state ... employees may not avail themselves of absolute immunity if their conduct was 'willful, malicious, or [constituted] criminal acts or omissions or ... acts or omissions done for personal gain.'"); *Shell v. State*, 893 S.W.2d 416, 421 (Tenn. 1997) ("state officers and employees are liable in their individual capacities for malicious acts").

In a case construing TENN. CODE ANN. § 9-8-307(h), the Sixth Circuit Court of Appeals has observed that "the Tennessee courts have not revealed which party bears the burden of proof on the existence of immunity," but opined that Tennessee would place

the burden of persuasion on plaintiffs "when defendants assert immunity as government workers." *Purisch*, 76 F.3d at 1421. Therefore, this court must examine the complaint to determine if the plaintiffs have pled facts sufficient to withstand the assertion of immunity under TENN. CODE ANN. § 9-8-307(h).

With respect to the defendant Wilmetta Williams, there are no allegations in the complaint that Ms. Williams willfully, maliciously, criminally, or for personal gain, acted or failed to act. Instead, the only specific allegations about Ms. Williams in the complaint, other than the statement that she "is the Director of NECSA and is an adult resident citixen [sic] of Unicoi County, Tennessee," are regarding her knowledge. In paragraph 14 of the complaint, the plaintiffs allege that "Defendant NECSA, itself or by its agents/employees Defendants Williams and/or Hampton, knew that Plaintiffs were the lowest bidder on several BCBS/Blue Care contracts with different counties" and that "Defendants NECSA, Williams and Hampton knew of the contractual obligations (that the lowest bidders were to be called out first) of BCBS to the ambulance service providers. Mere allegations of knowledge do not overcome Ms. Williams' claim of immunity under TENN. CODE ANN. § 9-8-307(h). Accordingly, this action must be dismissed as to Ms. Williams. See *Watson v. Young*, 2000 WL 987297, *2 (Tenn. App. July 10, 2000) ("The

immunity provided by [TENN. CODE ANN. § 9-8-307(h)] serves an absolute defense to all actions not within the express exceptions.").

Regarding defendants Sharron Fox and Kent Hampton, the plaintiffs allege in paragraph 11 of the complaint that these defendants "had been intentionally routing calls to companies who did not have the lowest bid and leaving [Quality Care Ambulance Service] out of the loop without any just cause." In paragraph 13, the complaint recites that "Defendant ETCSA and Fox intentionally and maliciously called out other ambulance companies who had higher bid rates" while the exact same statement is made about Mr. Hampton in paragraph 14. Although the complaint gives little detail as to the motives or the basis for these "intentional and malicious" actions, this court is unable to state at this point in the litigation that the complaint fails to state a claim due to immunity on the part of Ms. Fox and Mr. Hampton. Accordingly, dismissal of plaintiffs' claims against these defendants in their individual capacities is not merited.

III.

An order will be entered contemporaneously with the filing of this memorandum opinion, granting the moving defendants'

motion to dismiss in part. This action will be dismissed in its entirety as to all movants, except Sharron Fox and Kent Hampton, individually, and the plaintiffs' breach of contract claim will be dismissed.

FILED: April 22, 2002

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE